I. Appel Corporation d/b/a Somerville Mills *and* Furniture Workers Division, Local Union 282 of the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO. Cases 26–CA–13485, 26–CA–13532, and 26–CA–13654

August 31, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On October 22, 1990, Administrative Law Judge Nancy M. Sherman issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions, as modified below, and to adopt her recommended Order as modified.

The judge found that the Respondent violated the Act by insisting, for a period of a least 4 days, that negotiations be held alternately in Jackson and East Memphis, Tennessee,[2] instead of continuing to hold them only in East Memphis. As the judge found that the Respondent's proposed change of location was not unreasonable, i.e., it accommodated legitimate interests of both parties and was not offered as a means of avoiding its bargaining obligation to the Union, we shall dismiss the allegation that the Respondent's insistence constituted an unlawful refusal to bargain in good faith with the Union.

The relevant facts are not in dispute. The Respondent's plant is in Somerville. After the Union was certified as the collective-bargaining representative of the Somerville employees, the Union asked that bargaining be held either at the Somerville plant or at the Union's office in Memphis. The Respondent suggested a ''neutral place'' between Somerville and Memphis. The Union agreed to the Respondent's suggestion and the first six negotiating sessions were held in East Memphis (which is about 31 miles from the Somerville plant). The Respondent then proposed that the parties meet alternately in Jackson and East Memphis.[3] It asserted that the difference in mileage between Somerville and Jackson on the one hand and Somerville and East Memphis on the other would be negligible to the employees and would save considerable travel for the Respondent's vice president, Young, who attended each session.[4] The Union rejected this proposal stating, inter alia, that ''The difference in mileage on the employees may be negligible, but the psychological effect that would result from such management dictation would [undermine] and weaken the union's strength and effectiveness.'' The Union suggested that all further negotiations be held in Somerville. The Respondent then modified its position by proposing alternating negotiation sites among Jackson, Somerville, and East Memphis. The Union rejected this proposal and stated that it would be available to meet in East Memphis or Somerville. The Respondent then altered its position and said that it would be available to meet in East Memphis for the next session. The Union accepted this proposal and the parties met for negotiations in East Memphis.

The judge found that the Respondent's proposal for a change in the location of bargaining was not unreasonable. The proposal accommodated the Respondent's legitimate interest in reducing the travel distances for Vice President Young and did not involve distances that were so great as to be unreasonable. She further found that the Respondent's proposed site was not unduly burdensome to the Union. The judge found that the proposal inconvenienced the Respondent's attorney and plant manager no less than the Union's officers and employees on the Union's bargaining committee. Nevertheless, the judge found that the Respondent's brief insistence on a change in location amounted to violation of Section 8(a)(5) and (1). Her finding was based on what she described as a rebuttable presumption that parties are to meet at or near the place where the unit employees work. In her view, this presumption cannot be rebutted by a showing that proposals were reasonable and advanced in subjective good faith.

The judge's analysis is not supported by precedent. Section 8(d) simply requires the parties ''to meet at reasonable times and to confer in good faith.'' Although the statute makes no express reference to reasonable places, the Board with court approval has found that a party's proposal for a given location of

[1] The Respondent's exceptions argue that the judge's 8(a)(5) and (1) finding, based on the change in production rate for sewing gussets in cotton panties, is predicated on her erroneous inference that the Respondent's reason for the change was to reduce labor costs. We find no merit in this exception because that inference, although mentioned in her factual findings, was not critical to her legal analysis. In her analysis, the judge rested the finding of a violation on the facts that a change in production rate is a mandatory subject of bargaining and that the Respondent had made the change without giving the Union notice and an opportunity to bargain. We agree with this analysis. The gravamen of the complaint is that the Respondent made a unilateral change, not that it made the change for any given reason. Concededly, the reason for a given decision to make a change may be relevant to whether the decision is a mandatory subject of bargaining. However, we conclude that a decision to change the production rate is a mandatory subject irrespective of the reason for the decision. Accordingly, the unilateral change in the rate was unlawful under Sec. 8(a)(5).

[2] All locations involved here are in Tennessee.

[3] The process would begin in Jackson.

[4] Young's office was in South Hill and he had to travel 160 miles round trip to East Memphis. Jackson would be much closer for him.

bargaining has a direct bearing on, and is a factor to consider in, determining whether that party has met its obligation to meet at reasonable times and confer in good faith.[5]

In the cases cited by the judge, where the Board has found that an employer's insistence on a proposed location for negotiations constituted an unlawful refusal to bargain, there was a finding that the proposal placed such a burden on the union as to warrant the inference of a stratagem to delay or to avoid bargaining.[6] When no actual delay in negotiations has taken place, the Board has nevertheless found an unlawful refusal to bargain where there has been an overall effort, undertaken in bad faith, to thwart the collective-bargaining process by instransigently refusing to meet with the Union in a reasonable place.[7]

Although the Board has often looked to the location of the bargaining unit in evaluating whether the insistence on a bargaining location is unlawful, the Board has stated that it does not take a per se approach to deciding where bargaining should take place and instead considers all the relevant circumstances bearing on the issue. Those circumstances include failure to justify the reason for a proposed location, the intransigence of a party's insistence on a location, and whether a party is acting in bad faith by making proposals for the purpose of delaying or avoiding negotiations.[8]

In sum, the determining factors in cases of this kind are whether the proposed bargaining location is unreasonable, burdensome, or designed to frustrate bargaining, and whether the proponent has been intransigent and in bad faith. None of these factors is present in the instant case. The Respondent's proposals were reasonable and accommodated its expressed legitimate interests. The Respondent and the Union had initially agreed to meet at a ''neutral'' site away from the Somerville plant, and did so on six occasions.[9] The Respondent's proposed site did not involve distances which greatly inconvenienced the Union or placed an undue burden on it. Further, the Respondent was not intransigent in this matter. When the Union rejected the Respondent's initial proposal to alternate meetings between Jackson and East Memphis, the Respondent modified its position by proposing to alternate meetings among Jackson, East Memphis, and Somerville. When the Union rejected this modified proposal, the Respondent agreed to resume negotiations at East Memphis, the site to which the parties originally agreed. The Respondent persisted in attempting to change the bargaining situs for only 4 days. Finally, there is no evidence that the Respondent's proposals were made in bad faith or were part of any overall scheme to delay or avoid bargaining.

For these reasons, we find that the General Counsel did not establish that the Respondent violated Section 8(a)(5) and (1) by failing to met its obligation under Section 8(d) to meet at reasonable times and to confer in good faith.[10]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, I. Appel Corporation d/b/a Somerville Mills, Somerville,

[5] See, e.g., *P. Lorillard Co.*, 16 NLRB 684, 696 (1939), enfd. as modified 117 F.2d 921 (6th Cir. 1941), reversed and remanded with instructions to enforce in full 314 U.S. 512 (1942), in which the Board stated: ''We believe further that the procedure of collective bargaining requires that the employer make his representatives available for conferences at reasonable times and places and in such a manner that personal negotiations are practicable.''

[6] See, e.g., *P. Lorillard Co.*, supra (employer's insistence that bargaining take place in New York, New York, when the affected employees and union were located in Middletown, Ohio, found to impose a ''grave'' burden on the union and in practical effect to permit employer to avoid bargaining); *Tower Books*, 273 NLRB 671, 672 (1984) (employer's failure to provide ''overriding reason compelling negotiations'' at its proposed site located some 700 miles from the affected employees and its intransigent insistence in refusing to consider holding negotiations at the locale of the represented employees found, when considering all the factors, to be a stratagem to delay or avoid bargaining); and *Clinton Food 4 Less*, 288 NLRB 597, 602–603 (1988) (unlawful refusal to bargain found where employer's insistence on meeting at a location 78 miles from the location of the represented employees placed onus and inconvenience of travel and expenses completely on members of union negotiation committee for financial convenience and physical comfort of its negotiator).

[7] *Burns Security Services*, 300 NLRB 1143 (1990).

[8] See *Tower Books*, supra, 273 NLRB at 672. In our view, the judge has misread *Tower Books*. That case does not hold that the insistence on a proposal of bargaining location other than that of the bargaining unit will be unlawful unless the party advances an overriding reason for negotiations to take place in the proposed site. Instead, the employer's failure to advance such a reason in *Tower Books* was only a factor to be considered. Other factors were the employer's intransigence and its conditioning of bargaining by offering not to litigate the Union's certification if the Union would agree to meet in the location it proposed.

[9] In contrast, in *Tower Books*, supra, the case principally relied on by the judge, there was no such initial agreement on bargaining sessions away from the plant.

[10] Chairman Stephens agrees with his colleagues that the Respondent's conduct did not fall short of the duty ''to meet at reasonable times and confer in good faith'' with the Union. Sec. (d). However, he thinks that the judge's statement of the rule—a party's refusal to agree to meet at or near the unit employees' place of employment is rebuttably presumed to be unlawful in absence of a ''compelling reason''—is not so much unsupported by the Board's precedents as an unnecessary extension of the dicta appearing in some of the cases.

It may well be that under the rule advanced by the judge the parties' bargaining would have gone more smoothly had they not been distracted by the temporary dispute over the situs. But in the absence of evidence that a party is engaged in bad-faith efforts to delay or avoid bargaining, or financially burden the union, the Act, in Chairman Stephens' view, allows some latitude in which the parties can work out their differences on this subject. Cf. *Burns Security Services*, supra. Nevertheless, the Board should be open to re-examining this subject should further experience show a proliferation of disputes over the situs of bargaining.

Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

''(a) As to employees in the below-named bargaining unit, imposing stricter standards for early disbursement of paychecks, changing the production rate for employees who sew gussets in cotton panties, or otherwise changing rates of pay, wages, hours of employment, or any other terms and conditions of employment, without giving prior notice to and an opportunity to bargain with Furniture Workers Division, Local Union 282 of the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO:

> ''All production, maintenance, and shipping employees at our Somerville, Tennessee, facility including quality control inspectors, expeditors, piece goods records clerk, and shipping clerks; excluding office clericals, guards and supervisors as defined in the Act.''

2. Delete paragraph 1(b) and reletter the subsequent paragraphs.

3. Delete paragraph 2(b) and reletter the subsequent paragraphs.

4. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT with respect to the employees in the following bargaining unit:

> All production, maintenance, and shipping employees at our Somerville, Tenneesee, facility including quality control inspectors, expeditors, piece goods records clerk, and shipping clerks; excluding office clericals, guards and supervisors as defined in the Act.

impose stricter standards for early disbursement of paychecks, change the production rate for employees who sew gussets in cotton panties, or otherwise change rates of pay, wages, hours of employment, or any other terms and conditions of employment, without giving prior notice to and an opportunity to bargain with Furniture Workers Division, Local Union 282 of the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO.

WE WILL NOT fail or refuse to honor Local 282's request for our bargaining agreements at other locations, Local 282's October 18, 1989 request for information, or any other request by Local 282 for relevant information, necessary for the proper performance of Local 282's duties as the bargaining representative of the foregoing unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under the Act.

WE WILL, on request by Local 282, return to the production rate, for employees who sew gussets on cotton panties, used before January 1990.

WE WILL honor Local 282's request for our bargaining agreements at other locations, and Local 282's October 18, 1989 request for information.

WE WILL make employees whole, with interest, for any losses they may have suffered by reason of our unilateral change in production rates for sewing gussets on cotton panties.

As to the early disbursement of paychecks, we have already returned to the practice followed before our unilateral change in that practice.

I. APPEL CORPORATION D/B/A SOMERVILLE MILLS

Jack Berger, Esq., for the General Counsel.
John P. Scruggs, Esq., of Memphis, Tennessee, for the Respondent.
Ida Leachman, of Memphis, Tennessee, for the Charging Party.

DECISION

STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge. These consolidated cases were heard before me in Memphis, Tennessee, on May 14 and 15, 1990, pursuant to a charge filed by Furniture Workers Division, Local Union 282 of the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO (the Union) against Respondent I. Appel Corporation d/b/a Somerville Mills, in Case 26–CA–13485, on October 17, 1989, and amended on November 8, 1989; a complaint issued in that case on November 8, 1989; a charge filed by the Union against Respondent in Case 26–CA–13532, on November 3, 1989, and amended on December 6, 1989; a consolidated complaint in these two cases issued on December 11, 1989; a charge filed by the Union against Respondent in Case 26–CA–13654 on January 18, 1990, and amended on March 2, 1990; and an amended consolidated complaint in all three cases, issued on March 6, 1990. The amended consolidated complaint alleges that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by failing and refusing to honor the Union's request for certain information necessary for, and relevant to, the Union's performance of its function as the exclusive collective-bargaining representative of an appropriate unit of Respondent's employees; by insist-

ing that continuing contract negotiations be moved to unreasonable sites; and, without giving the Union prior notice and an opportunity to bargain, by imposing stricter standards for early disbursement of payroll checks and by changing the production rate for employees who sew gussets.

On the basis of the entire record, including the demeanor of the witnesses, and after considering the briefs filed by counsel for the General Counsel (the General Counsel) and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with an office and place of business in Somerville, Tennessee, where Respondent manufactures ladies' panties. During the year preceding the issuance of each of the complaints, Respondent shipped directly to points outside Tennessee, and purchased and received directly from points outside Tennessee, goods and materials valued in excess of $50,000. I find that, as Respondent admits, Respondent is engaged in commerce within the meaning of the Act, and that assertion of jurisdiction over Respondent's operations will effectuate the policies of the Act.

The Union is a labor organization within the meaning of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

On December 5, 1988, the Union was certified as the exclusive bargaining representative of an admittedly appropriate unit of Respondent's employees, which unit is specifically described in Conclusion of Law 3, infra, and which consists basically of Respondent's production, maintenance, and shipping employees at its Somerville plant. The Union and Respondent have been engaged in negotiations for a collective-bargaining agreement with respect to that unit since February 28, 1989. Ten bargaining sessions were held between that date and April 3, 1990. As of the close of the hearing before me, on May 15, 1990, no complete collective-bargaining agreement had been reached.

B. *Respondent's Alleged Unlawful Insistence that Contract Negotiations Be Moved to Unreasonable Sites*

After being certified, the Union asked that bargaining sessions be held either at the plant in Somerville, Tennessee, or at the union office in Memphis, Tennessee. Company Attorney John P. Scruggs suggested a ''neutral place'' between Somerville (which is southeast of Memphis) and Memphis. The first six negotiating sessions, between February 28 and October 4, 1989, were held at one of two motels in East Memphis, about 31 miles from the Somerville plant, with the parties taking turns at paying for these accommodations. During these negotiations, Respondent was represented by Attorney Scruggs, whose office is in Memphis, Tennessee; by Somerville Plant Manager Joe Perritt, who lives in Somerville; and by Vice President Robert Young, whose office is in Scotts Hill, Tennessee. The Union was represented by President Willie Rudd and Vice President Ida Leachman, both of whom have offices in Memphis, and by seven bargaining unit employees who worked at the Somerville plant. All of these sessions were held on weekdays, and all but one (on August 1, when the parties met between 9:50 a.m. and 5 p.m.) began an hour or more after the 4 p.m. end of the employees' workday.[1] Through the October 4 negotiations, there had been no problems regarding the site, and there had been no mention of changing it.

By letter dated October 12, 1989, Scruggs proposed October 24 or 25 as the date of the next negotiating session. He also proposed that

> [W]e negotiate in Jackson, TN, at the Ramada Inn every other session. My map shows it is only seven miles difference between Somerville and Jackson, and Somerville and Memphis.[2] The difference in mileage on the employees would be negligible, and meeting in Jackson would not require my client to drive 160 + miles round-trip to attend negotiations. Of course, you and Mr. Rudd would have to drive this distance to meet in Jackson—but it seems fair enough to at least share this inconvenience by meeting every other session in Jackson.

Inferentially, Scruggs' reference to ''the client'' was to Company Vice President Young, whose Scotts Hill office (about 60 miles east of Somerville) is about 30 miles southeast of Jackson, which is about 65 miles northeast of East Memphis. Scruggs' October 12 letter was the first mention of changing the location of negotiations.

By letter to Scruggs dated October 19, 1990, Rudd alleged that Scruggs' October 17 letter to Leachman was ''of such poor taste and bad faith, that I felt compelled to respond to it.'' Rudd stated that Scruggs' proposal to move the negotiations to Jackson is rejected for the following reasons:

> 1. It was the company's idea to hold these negotiations in Memphis, which the union was initially opposed to, and Jackson was never mentioned, nor the amount of miles that your client had to travel.
>
> 2. The difference in mileage on the employees may be negligible, but the psychological effect that would result from such management dictation would [undermine] and weaken the union's strength and effectiveness.
>
> . . . .
>
> Since you claim that it is only seven miles difference between Somerville and Jackson, Somerville and Memphis, the difference in mileage for Mrs. Leachman, myself and your client would be negligible, but certainly more convenient to your client and his employees, than it is to us in terms of where the previous sessions have been held.

The letter further stated that ''[i]f the company's concerns are legitimate and in good faith, the union suggests that all future negotiations be held in Somerville, Tennessee, at one of the following locations.'' The letter specified a number of possible Somerville locations, including but not limited to Respondent's plant, and further stated, ''Any other locations

[1] Similarly, all of the next four sessions were held on weekdays and began at 5:20 p.m. or later.

[2] In fact, the difference is about 16 miles; Jackson is about 47 miles from the Somerville plant.

in Somerville that management suggests will be seriously considered.''

The parties did not meet on October 24 or 25. By letter to Scruggs dated October 26, 1989, Leachman stated that the Union was available to meet on November 2 and 3, and that the Union's October 19 letter had listed the meeting places ''acceptable to the Union.'' The parties did not meet on November 2 or 3. By letter to Leachman and Rudd dated November 2, 1989, which the Union received at 10:15 a.m. that day by courier, Scruggs stated:

> In an attempt to accommodate everyone's wishes in this matter, I propose we simply alternate negotiations sites. I propose the next session be held at the Ramada Inn in Jackson, TN, commencing at 5:00 p.m. on November 7 or November 8. The next session after that could be held in Somerville, at the union's choice of the Fayette County School Board Conference Room, the Chamber of Commerce or at Chickasaw Gas.[3] Then we could meet back at the LaQuinta in [East] Memphis [where all but one of the previous sessions had been held].

By hand-delivered letter to Scruggs dated November 3, 1989, Rudd stated that the Union was available to meet on November 7 at 5 p.m. ''at the same location where all previous meetings have been held, or we will again agree to meet in Somerville, which will [considerably] reduce the traveling miles for management.'' By hand-delivered letter to Rudd and Leachman dated, and received by them, on November 6, 1989, Scruggs stated, inter alia:

> Mr. Young is not available to travel to Memphis or Somerville this week for negotiations . . . We would be available to meet in Memphis on either November 14 or 16, commencing at 5:00 p.m.

The Union did not reply to this proposal.[4] The parties did not meet on November 7, 8, 14, or 16. On an undisclosed date prior to November 20, the Union proposed a meeting on November 21. By letter to Leachman dated November 20 and delivered by courier, Scruggs stated that he was unable to meet on November 21 because ''That is a short work week due to the holiday, and one I have blocked out to prepare for [an NLRB hearing in another case, scheduled to start Monday of the following week. Consequently, I am unavailable until after [that] hearing concludes.'' Scruggs' letter went on to propose a negotiating session at 5:15 p.m. on December 5 or 6 ''at a site to be mutually agreed upon.''

By letter to Scruggs dated November 22, 1989, Leachman accepted Respondent's proposal for a December 5 meeting at 5:15 p.m. and went on to say:

> In order to minimize the company's travel concerns, the union will again be willing to meet in Somerville, TN.
>
> If the company is not serious about its alleged travel concerns, the union will expect the meeting to be at the LaQuinta Inn [the East Memphis motel where all but one of the previous meetings had been held], or some other hotel in that area.

Thereafter, Scruggs called the Union and canceled the December 5 meeting.

By letter to Perritt dated December 11, 1989, the Union proposed a meeting at the plant on December 20, 1989, to discuss certain issues (previously raised by the Union) whose nature is not disclosed by the record but which apparently did not at least directly involve contract negotiations. This letter, received into evidence without objection or limitation, states in part:

> It was the Company's position that you will discuss these issues at the time the parties meet for negotiations. However, the company has also [taken] the position that it won't meet for negotiations unless the union agrees to meet in Jackson, Tennessee. The union will not agree to meet in Jackson, thus no meeting has taken place.

On December 12, 1989, the parties agreed to meet for negotiations on December 20 at the LaQuinta Inn in East Memphis. That meeting was in fact held at that location. This was the first meeting between the parties since October 4. The parties met in another motel in East Memphis on January 24, February 20, and April 3, 1990, the last day on which they met prior to the hearing in mid-May.

At the hearing, Leachman testified that the distance between Somerville and East Memphis is less than 30 miles one way (in fact, the distance is about 31 miles); that the distance between Somerville and Jackson is about 90 miles one way (in fact, the distance is about 47 miles); and that as to the employees in the bargaining committee, a Jackson bargaining location would be unreasonable because it was too far for them to drive and they might not know where a Jackson meeting site was.

C. *Respondent's Alleged Unlawful Unilateral Changes*

1. Allegedly stricter standards for early disbursement of payroll checks

a. *Background*

Ordinarily, Respondent's employees receive their paychecks no earlier than 3:30 p.m. on Fridays, a half hour before the end of the workday. During a period which ended no later than early 1989, an employee who wanted to receive his paycheck early (because, for example, he intended to leave early on Friday to attend a funeral) would direct his request to Plant Manager Perritt or to the production manager, and one of them would decide on an ad hoc basis whether to grant or deny the request. About mid-1988 or early 1989, requests for early paychecks began to be handled by the line supervisors, who granted or denied such requests on an ad hoc basis. No contention is made that this shift in responsibility involved any unfair labor practice.

In October 1989, Respondent withdrew from its line supervisors the power to grant (at least on their sole volition) employees' requests for early paychecks, and imposed the requirement (or, perhaps, the additional requirement) that such requests had to be approved by Perritt or the production manager. Respondent did not notify or negotiate with the

[3] All three of these Somerville sites had been suggested in the Union's October 19 letter.

[4] This finding is based on a November 20, 1989 letter from Scruggs to the Union, received in evidence on the General Counsel's motion, and without objection or limitation.

Union about this change. Also in October 1989, Respondent posted the following notice:

> Payroll checks will not be given out before 3:30 p.m., on Friday unless prior arrangements have been made and approved by Supervision.

Leachman testified that the Union did not regard this notice as a problem ''As it's written.'' No contention is made that this shift in responsibility, or the posting of this notice, involved any unfair labor practice.

b. *The alleged unlawful unilateral change*

On a Friday subsequent to the posting of this notice, and probably on October 27, so many employees had left the plant early after receiving early paychecks that management had difficulty in shipping out orders to an important customer. When Company Vice President Young learned of the reasons for this problem, he told Perritt not to give out paychecks before 3:30 p.m.

On a Wednesday which (inferentially) was the Wednesday following this Perritt-Young conversation, unit employee Tracy Mitchell made arrangements with her supervisor to receive her paycheck early on Friday, because she expected to leave early that Friday in order to attend a funeral. When she requested her paycheck at the agreed-upon hour on Friday, the supervisor refused to give it to her. Mitchell complained about this incident to Leachman. Two other employees had similar experiences, although the record fails to show the dates or whether Leachman's knowledge of such incidents was related to any complaints they may have made to the Union.

On November 2 or 3, Leachman telephoned Perritt and asked him why Respondent had discontinued the policy of permitting employees to get their checks early. He told her that Young had told him that he could not give them out until 3:30 p.m. on Friday.[5] Leachman thereupon telephoned Young, who said that he had directed Perritt not to issue any more checks because they had experienced absenteeism. Leachman asked him what absenteeism had to do with the change in the policy.[6] Young said that he would call Perritt to see about it, and would then get back in touch with Leachman. Young never did get back in touch with Leachman about the matter. Respondent did not notify or negotiate with the Union before this change was made.

c. *Aftermath*

At the time of the May 1990 hearing, Respondent was again following the practice of entertaining requests for early paychecks. The employee was supposed to direct such a request to his immediate supervisor. If that supervisor did not think the request was warranted, he was supposed to so advise the employee, but to nevertheless check with Perritt or the production manager, one of whom made the final decision. The record fails to show when this change was effected. No contention is made that any unfair labor practice was involved in this change with respect to the newly adopted practice which the Union found out about around early November 1989.

2. Alleged change in production rate for sewing gussets in cotton panties

Paragraph 14(b) of the second amended consolidated complaint issued on March 6, 1990, alleges that ''On or about January 3, 1990, Respondent changed its production rate for its employees who sew [gussets].'' This allegation was admitted in paragraph 14(b) of Respondent's answer dated March 9, 1990. On May 14, 1990, the first day of the hearing, I granted Respondent's motion for leave to amend this portion of its answer to read as follows:

> The Respondent admits that on or about January 3, 1990, it implemented production of a new product, and a production standard for that product, which standard differed from the production standard applied to the product which immediately preceded introduction of the new product. All other allegations of paragraph 14(b) of the Second Amended Consolidated Complaint are denied.

Many (and, perhaps, all) cotton panties manufactured by Respondent have a gusset consisting of two bilaterally symmetrical pieces of cloth which are exactly alike and which, in the completed garment, form a double layer of cloth in the crotch area. Respondent prescribes the order in which the gusset sewer must perform the elements of each gusset-sewing job. Before January 1989, the work layout for a gusset sewer on cotton panties included two stacks of gusset pieces. The gusset sewer would pick up a gusset piece from one stack, lay it on the serger (a kind of sewing machine), position it to the needle, pick up a panties' back, lay it on top of the gusset piece, position the panties' back, pick up a gusset piece from the other stack, lay it on top of the panties back, and sew all three layers together with one seam. Then, she would reposition the three-piece assemblage, line it up with the needle, pick up a panties' front, lay it on top of both gusset pieces, sew the front to the two-layer free end of the two-layer gusset with one seam, cut the thread, and ''dispose'' the four-piece assemblage to her lap or to a table.

[5] This finding is based on Leachman's testimony and on credible parts of Perritt's testimony. Initially, he testified that he told her that Young had changed the procedure of giving out checks early, and that Perritt could not give them out early. Later, he testified that he told her Young had decided not to give the checks out without prior approval by the supervisor before 3:30 p.m. Then, Perritt gave the following testimony:

> Q. [By the General Counsel] Is that what you told her? I thought you told her earlier—you said earlier that Bob Young made a decision that no checks would be given out before 3:30.
> A. Well I'm not sure.
> Q. Quite possible though that's what you told her, right?
> A. You know, I don't have any copies of my conversations with her, you know, I don't want to tell a lie what—exactly what she said because I'm not sure.

Because Perritt was admittedly uncertain about what he told her, and he admittedly was given by Young the instructions which during the Perritt-Leachman conversation Perritt attributed to Young according to Leachman's testimony, as to the Perritt-Leachman conversation I credit her to the extent that her testimony may conflict with Perritt's.

[6] In view of this remark by Leachman, I am inclined to discredit Perritt's account of his conversation with her earlier that day, to the extent that this account may suggest that he explained to her the incident which had led to Young's order. However, this issue is immaterial.

This production process leads to a garment in which the seam which connects the gusset with the back of the panties is wholly concealed, and the seam which connects the gusset with the front is ''open''—that is, the serge stitches protrude, and are visible, from the side of the panties which will touch the skin.

In November and December 1989, Respondent's plant engineer did tests on an new method of sewing gussets in cotton panties. Then, a timestudy was performed on the gusset-sewing operation using the new method. Under the new method, the work layout for a gusset sewer includes only one stack of gusset pieces. The gusset sewer picks up (secures) a panties' back, positions it to the needle, picks up two gussets, lays them on top of the back, and sews all three layers together with one seam. Then, she repositions the three-piece assemblage, lays it out smooth, positions it, picks up a panties' front, aligns it to the two-layer free end of the two-layer gusset, sews the front of the panties to the two-layer gusset with one seam, and ''disposes'' the four-piece assemblage. The only difference between the panties so produced and the panties produced under the old method is that under the new method, both (instead of only one) of the seams which join the gusset to the rest of the panties are ''open'' on the side of the panties which will touch the skin. Perritt testified that the new method of sewing gussets is faster than the old one, because under the old method, the sewer had to pick up a gusset twice, and under the new method, the sewer picks up both gussets at once. He gave no other reason for any difference in speed.

Employees who sew gussets are paid on a piecework basis, and are subject to production standards. Since about 1986, the initial step used by Respondent, in determining how much time should be used to perform a new job, has been to list the job elements required to perform the job, and then to use a document, entitled the ''General Sewing Data Sheet,'' to determine the time required for the performance of each element.[7] Perritt testified that this system was used in connection with the new method for sewing gussets in cotton panties. His testimony in this respect is only partly corroborated by comparison of the General Sewing Data Sheet with Respondent's GSD aAnalysis for that method. Thus, the GSD analysis for the new method attaches, to code numbers not clearly set forth on the General Sewing Data Sheet, the job elements ''Sew 6 Inches'' and ''Sew 3 Inches.'' The ''TMU's'' (a TMU equals .006 of 1 minute) attached to these elements total 76.3. The TMUs' for the seemingly corresponding entries on the GSD Analysis for the old method (''Sew to end and off'' and ''Sew across'') total 94.[8] Perritt testified that the time which is assigned to a particular job element does not change when a new garment is introduced, that the General Sewing Data Sheet has been in effect since 1986, and that it was used to calculate the standards for sewing cotton gussets under both the old method and the new method.[9]

In order to determine the piece rate on a job, Respondent divides the hourly ''base rate'' by the ''production rate''—that is, the number of units which, according to the GSD analysis, should be produced every hour. As of the end of 1989, the hourly ''base rate'' was $4.65; the ''production rate'' under the GSD analysis of the old method was 10 dozen per hour; and the ''piece rate'' was $.465 per dozen. Under the GSD analysis performed toward the end of 1989, the hourly ''base rate'' was $4.65; the ''production rate'' using the new method was 13.76 dozen per hour; and the ''piece rate'' was $.337 per dozen. The difference between the ''production rates'' (and, therefore, the piece rates) was due entirely to the fact that the analyses showed the number of TMUs per unit under the new method (510) was lower than the number of TMUs per unit under the old method (716). Perritt testified that the two methods differed in that under the new method, the gusset sewer made one pickup of two gussets per unit, while under the old method she made two pickups of one gusset per unit. He did not testify to any other differences. The difference in the number of pickups accounts for a difference of 52 TMUs per unit at most.[10] However, the analysis of the new method unaccountedly specifies, for a 6-inch seam under each method, 42.9 TMUs under the new method and 56.5 TMUs under the old one; and for a 3-inch seam under each method, 33.4 TMUs under the new method and 37.5 TMU's under the old one—that is, a difference totalling 17.7 TMUs. In addition, the record fails to suggest why the Analyses specified, as the final-element ''disposition'' of the two-seamed assemblage, a two-handed motion under the old method (42 TMUs) and a one-handed motion under the new one (23 TMU's), a difference of 19 TMUs. The final entries in the old analysis and in the new Analysis are, respectively, ''Extra time'' (101 TMUs) and ''Addl TMU's for Rate Equity'' (46 TMUs), which entries differ by 55 TMU's—that is, more than the difference attributable to the only change in method to which Perritt testified. Perritt explained the ''Extra Time'' entry as follows:

> . . . this rate here [on the GSD analysis of the old method] was originally set before the Company got the GSD system. The production standard was 80 dozen . . . when we got the GSD system in and we put all the elements in to do this job then it came out to where we had to add this time to make it even with our old established rate.[11]

Perritt testified that the ''Addl Time for Rate Equity'' entry on the GSD analysis of the new method is ''A time that's added to the job as a safety factor. In other words if we don't have a . . . going to give them the benefit of the doubt, we're going to add that much time to it.''

The new method of sewing gussets in cotton panties had been used at Respondent's Alamo, Tennessee plant, which also used the GSD system. Perritt testified that in the fall of 1989, he had received a call from corporate headquarters in New York that the sales department wanted to change all the

[7] This is a document which is used in all of Respondent's plants and, according to Perritt, is widely used in the industry.

[8] Although the old-method panties received in evidence have a smaller hip size than the new-method panties received in evidence, the critical gusset seams are about the same length, and neither GSD analysis refers to the size of the panties.

[9] Cf. the text attached to fn. 11, infra.

[10] This figure is based on the number of TMUs listed in each analysis for the operations which precede the sewing of the first complete seam. Although the new method eliminates the allowance for ''Obtain top gusset match to back'' (69 TMUs), it adds an allowance for ''Sew pre-stitch'' (17 TMUs).

[11] Cf. the text attached to fn. 9, supra.

cotton gussets to the new type method because ''that's what they wanted to sell.'' Because the ultimate consumer could not detect the difference between the panties produced respectively by the old and by the new method unless she carefully inspected and compared the inside of a sample of each kind, I infer that this message from the sales department was not based on a belief that consumers would buy more of the new-method panties because such consumers would regard them as a better product. Rather, I infer that the sales department was motivated by a belief that by using a production method which at another facility or facilities Respondent had found to be cheaper, without changing the consumer-perceived quality of the panties, Respondent could increase profits from sales to retailers by selling the new-method panties at old-method prices and/or increasing sales by lowering prices. Perritt testified that the change in the method had caused the Somerville plant to make a GSD timestudy of the new method, and that because this time study showed the new method required less time to do, the rate ''had to be changed.'' In early January 1990, the Somerville plant began to use, with respect to practically all cotton panties with gussets, the new method and, concomitantly, the production standards and piece rates set forth on the GSD analysis of the new method—that is, production standards increased by about 26 percent, and piece rates lowered by about 27 percent, than specified in the GSD analysis of the old method.[12] In the few instances where gussets on cotton panties were sewn with the old method, Respondent used the piece rates and production standards which had been in effect before 1990.

Of the 200 production employees who work in the Somerville plant, about 55 sew gussets. Gusset sewers work on cotton, nylon, polyester, lycra, and other types of panties. Perritt testified that about 20 employees were affected by the 27-percent decrease in the price for cotton gussets; and that, on an average, a gusset sewer spends about 10 percent of her time working on cotton gussets.[13] The gussets of all of Respondent's styles of cotton panties can be sewn by either method, without changing the cut of the gusset pieces or (so far as the record shows) making any other change in any other production process. The same is true of most, but not all, styles of panties made with other fabrics.

Respondent did not notify the Union about the new production rate for sewing cotton gussets or the new method for sewing them, and did not give the Union an opportunity to bargain about the matter. In late December 1989, Respondent and the Union agreed on a wage increase for all employees, in all job categories, to be effective on January 2, 1990. Leachman credibly testified that after the first of 1990, Chief Steward Marandy Wilkerson, a gusset operator who was a member of the negotiating committee and of the ''complaint committee,'' told her that the employees were being told by their supervisors that because of that wage increase, the employees' production quotas were going to be raised; this testimony was not received to show the truth of the report.[14] Perritt testified that the production standards were not increased as a result of the pay increase.

By letter to Young dated January 4, 1990, Rudd stated:

> Re: *Wage increases, Somerville Mills*
>
> . . . .
>
> It has been brought to the attention of this union, that management at the Somerville Plant have told some employees that their production quotas will be increased as a result of the most recent wage increases.
>
> Since the union has not agreed to such non-sense, I am sure the supervisors who are spreading this vicious garbage is [sic] doing so without your knowledge or approval, because you obviously know better. Therefore, the union requests that you inform the employees by written memo that no such agreement has been made with the union, and the employees should ignore what they have been told by supervision or heard regarding this matter.
>
> A refusal to comply with this simple request will strongly indicate that you support and condone these allegations, even if you had no knowledge of them previously.
>
> In any event, let it be known from this date forward that any attempt to unilaterally raise production quotas at the Somerville Plant will be opposed by every legal resource the union deems necessary and appropriate.

By letter to Rudd dated January 9, 1990, Scruggs stated:

> Your January 4 letter to Mr. Young has been forwarded to me for response. I am advised that your alleged statement (about an increase in production quotas as a result of the recent wage increase) was not made, or if it was made, it was not by any company representative. Hence, no notice to employees is warranted.

During the bargaining session on January 24, 1990, gusset sewer Marandy Wilkerson asked Vice President Young why the rate had been lowered, and the quotas increased, on cotton gussets. Young started saying, ''Marandy—,'' whereupon Company Attorney Scruggs cut him off. During the bargaining session on February 12, 1990, Wilkerson asked Young the same question. Scruggs cut Young off again, and told Wilkerson that Scruggs believed he was negotiating the contract and Young was not. During one of the three 1990 bargaining sessions through April 3, 1990,—probably during the February 20 session—Leachman asked Young the reason for the change in the cotton gusset rates; Scruggs told Leachman that Scruggs believed the parties were there to negotiate a contract, not to discuss the rates.

My findings in the preceding paragraph are based on Wilkerson's testimony and credible parts of Leachman's testimony. Perritt testified that he attended the 1990 contract negotiation sessions, and that he did not remember that the issue of the production standards for cotton gussets was on

[12] No contention is made that Respondent failed to add to the ''base rate'' a wage increase to which Respondent and the Union agreed effective on January 2, 1989 (see infra).

[13] It is unclear whether Perritt's 10-percent estimate was based on the total hours worked by all 55 gusset sewers, or only on the total hours worked by the 20 employees who (he testified) were affected by the change.

[14] In finding that such a report was in fact made by Wilkerson, I am aware that she was called as a witness for the General Counsel but was not asked about this conversation. However, the truth of Leachman's testimony about Wilkerson's report is indirectly corroborated by a January 4, 1990 letter from Rudd to Young.

the the table at any time, or an instance when Scruggs cut Young off from discussing production standards; Perritt further testified that he believed he would remember such a cutoff incident if it had happened. Leachman testified that ''I believe'' Wilkerson after January 4, 1990, raised the subject of production quotas on cotton gussets with Young, but ''it was not per se [Scruggs] and me negotiating,'' and Respondent did not agree during the 1990 negotiating sessions on January 24, February 20, or April 3 to discuss or negotiate regarding a change of production. Wilkerson impressed me as an honest and intelligent witness; she would likely have a particularly clear recollection of negotiations with respect to her own job as gusset sewer; and except as to the cutoff incidents Perritt testified, in effect, that he did not remember whether such events occurred. As to the cutoff incidents, I note that Young was present at counsel table throughout the hearing but did not testify;[15] and that the likelihood of any individual's overhearing a short conversation between three others during bargaining sessions was diminished by the large number of others who were also present (as many as 12 may have been there altogether—3 company representatives, 2 union officials, and the 7-employee bargaining committee). Moreover, Wilkerson's testimony as to the cutoff incidents is to some extent indirectly corroborated by the fact that it was Scruggs who answered the Union's January 4 letter to Young about alleged threatened increases in production quotas; and by Scruggs' request, in a letter to Rudd and Leachman dated December 12, 1989, ''In order that I may fulfill my responsibilities as the company's designated bargaining representative, I again request you direct all communications with the company to me, either by phone or in writing. You may copy Mr. Perritt and Mr. Young if you wish.'' Furthermore, in connection with the remarks which Wilkerson attributed to Leachman, Wilkerson's testimony was not squarely denied by Young, Perritt, or anyone else. Accordingly, and for demeanor reasons, I credit Wilkerson, notwithstanding the absence of square corroboration of her testimony, by Leachman or anyone else.

D. *Alleged Unlawful Failure and Refusal to Supply Information*

1. Failure and refusal to supply Respondent's bargaining agreements at other locations

As previously noted, Respondent's facility at Somerville, Tennessee, the facility covered by the Union's certification, manufactures ladies' panties. Respondent also has a facility in Thurmont, Maryland, which manufactures dresses, and facilities in Scotts Hill and Henderson, Tennessee, which cut ladies' panties and manufacture dresses and ladies' robes. The robes manufactured in Henderson, at least, include pile housecoats and dusters. All three of these other plants are represented by the International Ladies' Garment Workers' Union and/or a local of that union.

When called as a witness for the General Counsel at the outset of the hearing, Somerville Plant Manager Perritt, one of Respondent's representatives during the negotiations, testified that the employees at all four plants—that is, Somerville and the three ILGWU—represented plants—have similar skills and classifications. Thereafter, he was called by Respondent as a witness. Perritt, who was the plant manager at Henderson between 1983 and 1985 (when he became plant manager at Somerville), testified, in response to a question by me, that when he was at Henderson, the Henderson plant used, when hiring production employees, about the same standards of skill and experience now used at the Somerville plant. In response to a further question by me, he testified that experience at the Henderson plant would assist an applicant in obtaining a job at the Somerville plant if ''we checked her out and everything was okay.'' As a witness for Respondent, Perritt testified that the two plants use ''quite different'' kinds of fabric, which is a ''very important'' consideration in sewing operators' pay because the fabrics are handled differently and are sewn at different speeds, and that the two plants use different machinery, ''I doubt if there's very many pieces of equipment that . . . each plant could use.'' He further testified as follows:

> Q. [By company counsel Scruggs]: Are the garments made in the same or different ways at Henderson and Somerville?
>
> A. Well, they're made in the same process so far as cutting and sewing on assembly line, yes. They use the same methods in determining the standards, but taking into consideration the difference in the fabrics and the difference in the garments.
>
> Q. What about the skill level of the operators, same or different?
>
> A. Skill levels [are] somewhat different.
>
> Q. Which type of garment would require a higher skill level, panties or robes?
>
> A. Well, there are some jobs on the robes that would require just as high as anything in the panties, but the panties are maybe a little faster garment to produce because it doesn't have as much labor involved.
>
> Q. So it's kind of hard to compare apples with oranges?
>
> A. Right.

During the six collective-bargaining sessions between February 28 and October 4, 1989, the parties agreed on a recognition clause, and the Union accepted Respondent's proposals regarding jury duty and a savings clause. In addition, the Union agreed to some of Respondent's proposals regarding pay day, holidays, and vacations, although as to these matters there was only a partial agreement. No agreement had been reached with respect to grievance and arbitration, leaves of absence, no-strike, no-lockout, management-rights, union visitation rights, no-discrimination, illegal drug use, layoff or recall, plant safety or security, insurance, seniority, temporary job assignments, dues deductions, credit-union deductions, discipline, discharge, duration of contract, overtime, wages, hours, or ''special categories of employees'' (that is, part-time employees or temporary employees on call). Because of Respondent's strong opposition, the Union withdrew its proposal with respect to bulletin boards. Union Vice President Leachman, who was the Union's principal representative during bargaining negotiations, credibly testified to the belief that up to October 4, 1989, negotiations had been ''totally unproductive.''

On or shortly before October 4, 1989, Respondent put on the table proposals (as to whose subjects no agreement had

[15] However, I draw no inference from Scruggs' failure to testify at the hearing, where he acted as Respondent's trial counsel.

been reached) regarding drug testing and searching and physical examinations, and a proposal that employees receive no pay for nonworking time—specifically, holidays, vacations, and funeral leave. At that point, some agreements had been reached with respect to holidays and vacations, but not (so far as the record shows) funeral leave. During the October 4 session, the Union asked whether the drug testing and search and paid funeral leave were in place at Respondent's other locations. Respondent replied that this was none of the Union's business, and refused to discuss whether these items were in effect, or what was in effect, at other locations. By letter to Company Attorney Scruggs dated October 10, 1989, Union President Rudd stated:

> This letter shall confirm the union's request, which was made at the bargaining table on October 4, 1989, for copies of all labor contracts that exist between [Respondent] and other labor unions.

By letter to Leachman dated October 12, 1989, Scruggs stated in part:

> Since this information pertains to employees not only outside the bargaining unit, but in different plants making different products in different cities, there is no automatic presumption that such a broad-based request is relevant to negotiations between your union and Somerville Mills. I would request the union explain why it feels it needs each and every article in each and every contract—without regard to the jobs being done, or where, or for how long—in order to negotiate a contract for Somerville Mills. Upon a sufficient showing of relevancy for this sweeping request for nonunit information, we will give it consideration.

By letter to Scruggs dated October 19, 1989, Rudd renewed the Union's request for ''copies of all labor contracts that exist between [Respondent] and other labor unions.'' As reasons for this request, Rudd stated that such agreements would indicate whether Respondent's bargaining demands with respect to the Somerville plant were a ''matter of corporate policy, that is applied uniformly to all union bargaining units, or whether this union and this unit have been singled out in retaliation to these workers voting for representation in this union . . . . On the other hand, these documents could provide the kind of information that may be very helpful in helping both parties in our efforts to resolve our differences in good faith, and sign a contract that both parties can live with.''

Respondent never furnished these contracts. On November 9, 1989, Respondent and Scruggs received a copy of the first complaint herein, which alleged that Respondent had violated Section 8(a)(1) and (5) by failing and refusing to provide ''Copies of all labor contracts that exist between Respondent and other labor organizations. [Such] information . . . is necessary for, and relevant to, the Union's performance of its function as the exclusive collective-bargaining representative of the Unit.'' A letter to Rudd from Company Attorney Scruggs, dated November 10, 1989, reads as follows:

> In order that we may intelligently and properly evaluate the union's contract proposals submitted in the negotiations with [Respondent], please provide this office with all contracts between the Furniture Workers Division, I.U.E. union and other employers.
>
> Copies of such agreements will indicate whether the union's proposals to [Respondent] are a matter of union policy that is applied uniformly in all union bargaining, or whether [Respondent] is being treated differently. These documents would also provide the kind of information that may be very helpful in helping both parties in our efforts to resolve our differences in good faith.
>
> Please expedite your response to this request. It would be helpful if we had this information in order that we might study it prior to our next negotiations sessions.
>
> This request is submitted without prejudice to the company's objection to the relevancy of your October 10, 1989, request to the Company for this same information.

Under a letter dated December 1, 1989, 19 days before the bargaining session which next followed Scruggs' request, Rudd forwarded to Scruggs copies of 19 bargaining agreements between the Union and other employers. The letter concluded with the statement, ''Hopefully this will help you and your clients realize what a two party contract [looks] like, and hopefully this will help you put some acceptable proposals on the table at Langston and Somerville Mills.''[16]

By letter handed to Scruggs and Young during the February 20, 1990 bargaining session, the Union stated that it was ''willing to give serious consideration to the following items as the company has in [its] contract [sic] with I.L.G.W. Union.'' After listing the unresolved issues described supra, the letter went on to request that these items ''be presented verbatim'' in writing during the meeting that day. Respondent never supplied this information to the Union.

At the May 1990 hearing, Leachman credibly testified that the Union asked for the contracts in question because the Union was trying ''to formulate some proposals that would be acceptable to the company . . . we were trying to find some common ground.''

2. Alleged failure and refusal to furnish information regarding subcontracting of unit work

By letter to Company Vice President Young dated July 21, 1988, after the Union had won the representation election but before the Union's certification and more than 6 months before the filing of the first charge, Union President Rudd stated in part:

> It has been brought to the attention of this union that Somerville Mills has conducted layoffs since the N.L.R.B. election.

[16] The 19 employers named in the letter included Bozof Dinettes, Burgie Industries and Memphis Vinegar, Fraenkel Bedding and Wholesale, Imperial Dinettes, Imperial Warehouse, Mid-South Wood Products, Memphis Sash & Door, National Bedding Company, Nylon Net Company, Sealy Mattress Company, Southern Foam Sales, Trojan Luggage, and Wire Components. The record otherwise fails to show whether any of these firms employed employees with classifications and skills similar to those of employees of Respondent in the certified unit. Nor does the record show either the products made, or the employees' skills, at Langston Mills.

> . . . the union requests to meet with representatives of the company to discuss the effects of these layoffs.

Respondent did not agree at this time to negotiate with the Union regarding these layoffs.

On August 14, 1989, Respondent's Somerville plant sent about 2050 dozen pairs of panties, which had been cut in Somerville, to Royal Sewing, an independent contractor in New York City, to be assembled. On August 23, 1989, Respondent's Somerville plant sent about 3000 dozen pairs of panties, which had been cut in Somerville, to an independent contractor in Guatemala to be assembled. On September 5, 1989, Respondent's Somerville plant sent about 3970 dozen pairs of panties, which had been cut in Somerville, to Royal Sewing to be assembled. On September 15 and October 4, 1989, Respondent's Somerville plant sent a total of about 19,800 dozen pairs of panties, which had been cut in Somerville, to the Guatemala independent contractor to be assembled.[17]

On an undisclosed date prior to October 18, 1989, employees on the bargaining committee (including gusset sewer Wilkerson and shipping department employee Tony Bryant) told Union Vice President Leachman that employees were being sent home early and being laid off for lack of work, while at the same time work was being ''shipped out'' of the Somerville plant.[18] By letter to Young dated October 18, 1989, Leachman stated in part:

> It is reported to this union that the unit employees are constantly experiencing a shortage of work, due to the company contracting out the work to non-union factories.
>
> In order for this union to properly and effectively represent our members and to protect their jobs, please provide this office immediately with the following information, which is relevant to the above referenced matter:
>
> A. Year and date contracting out work began.
>
> B. Names of persons involved in decision to contract out the work.
>
> C. Names and addresses of contractors.
>
> D. How much production is being contracted out?
>
> E. Detailed explanation of why decision was made to contract out the work.
>
> F. Number of hours lost per department, per employee since contracting out the work began and number of employees affected.
>
> G. Hourly and production incentive rates of all employees directly involved in producing the contracted out work.
>
> H. Detailed explanation of how the contracting out of this work will save the company money, plus cost saving breakdown.
>
> I. Copies of job numbers and descriptions of contracted out work, plus listing of standard unit per hour, and standard units per 8 hour day.
>
> J. Number of employees and shifts directly involved in producing, and the average amount of work produced weekly and the average number of hours worked to produce the contracted out work.
>
> K. Detailed explanation of how the work can be produced more efficiently by contracting it out.
>
> L. Detailed explanation of what business factors are involved in these alleged savings.
>
> . . . .
>
> The union requests to meet with you and management immediately after receipt of this information to bargain over these issues.

In connection with this request, the Union orally stated to Respondent that the Union needed this information because the perceived layoffs and shortage of work affected the earnings of the Somerville unit employees.

By letter to the Union dated November 2, 1989, Scruggs stated, inter alia:

> 5. *Request for information about work performed at other facilities*/Ms. Leachman's letter to Mr. Young, dated October 18, has been forwarded to me for response. Your request for information is based on an erroneous justification that unit employees are constantly experiencing a shortage of work. This is simply not true. The company will permit the union to examine the timecards of the Somerville employees if you desire to verify there is no shortage of work at the Somerville plant.

On October 20, 1989, Respondent's Somerville plant shipped about 4000 dozen pairs of panties, which had been cut in Somerville, to Royal Sewing for assembly. On December 1, 1989, Respondent's Somerville plant shipped about 5180 dozen pairs of panties, which had been cut in Somerville, to the Guatemala independent contractor for assembly.[19] Of the panties shipped to Guatemala on December 1, as to about 1560 dozen the order calling for them to be cut in Somerville and assembled in Guatemala had been drawn up by Respondent's New York office on October 20, 1989, after the Union's October 18, 1989 complaint about perceived shortage of work at the Somerville plant and request for information about contracting out.

After the Union had inspected the unit employees' attendance records, Leachman sent the following letter to Scruggs, dated December 13, 1989:

> On December 7, 1989, the union reviewed the company's attendance records of its employees.
>
> Mr. Scruggs, those records did not reflect the amount of work that was available to the workers, only days they were absent, and some of those absent days were because of layoffs. Therefore, the union renews its request as of October 18, 1989. (copy enclosed)

[17] The record contains only one production standard used in the Somerville plant in 1989—namely, 80 dozen per day for each gusset sewer on cotton panties. Assuming that the production standard was the same for the styles of panties sent to Royal and Guatemala between August 14 and October 4, sewing these panties in Somerville would have required a total of about 360 days of work for the 55 Somerville gusset sewers.

[18] My finding in this sentence is based upon Leachman's testimony, received into evidence without objection or limitation.

[19] Of these, about 1090 dozen were of a style which did not call for a crotch gusset.

By letter to Leachman dated January 15, 1990, Scruggs stated (emphasis in original):

> On October 18, 1989, you wrote Mr. Young alleging ''the unit employees are constantly experiencing a shortage of work, due to the company contracting out the work to non-union factories'' and, predicated upon that basis, requested twelve lettered information items constituting a voluminous amount of information. However, your request is based on a false premise—the employees are *not* experiencing a lack of work due to subcontracting. We attempted to demonstrate this [to] you by permitting your examination of the daily attendance records for the unit employees. Nevertheless, by your letter to me dated December 13, 1989, you renew your October 18, 1989 information request.
>
> The union has previously filed at least two unfair labor practice charges against this employer, alleging subcontracting as a violation of the National Labor Relations Act. No merit was found to either charge, and they were eventually either dismissed or withdrawn by the union. Your October 18 request raises those same issues. It is irrelevant because there has been no adverse effect on the Somerville bargaining unit. In addition, your request is burdensome and expensive to compile, and would contain confidential information, the disclosure of which could adversely affect the company's competitive position. Accordingly, we decline to furnish the information requested.

Somerville Plant Manager Perritt testified at the hearing that during the ''first part'' of 1990, most of the operators throughout Respondent's operations (including the Somerville plant) ''lost a few days'' because of ''excessive inventory on the floor'' of work to be done in a late stage of the production process. Between January 5 and 29, 1990, the Somerville plant sent about 20,400 dozen pairs of panties, which had been cut in Somerville, to Guatemala or Royal Sewing for assembly.

On an undisclosed date or dates during negotiations, Scruggs told the Union that there was no subcontracting or shipping of work out of the Somerville plant. The Union thereupon told Scruggs that employees in the shipping department had told Leachman that work was being shipped out to Guatemala, to ''Miami International'' (inferentially, referring to the Miami, Florida airport), and to Respondent's plant in Alamo, Tennessee, an unorganized plant which is about 36 miles from Somerville and, like the Somerville plant, manufactures ladies' panties.[20] Scruggs then said that if any subcontracting was being done, it had no adverse effect on the employees.[21]

A complaint allegation regarding Respondent's response to the October 18, 1989 request for subcontracting information was first set forth in the amended consolidated complaint issued on March 6, 1990, and including a notice that the hearing would begin on May 14, 1990. Respondent's initial answer to the March 6 complaint, which answer was signed by Scruggs and filed on March 9, 1990, admitted that Respondent had failed and refused to provide this information, but denied that it was necessary for, and relevant to, the Union's performance of its function as exclusive bargaining representative. By letter dated March 9, 1990, and sent to Leachman via courier, Scruggs stated:

> RE: Somerville Mills
> SUBJECT: Temporary Layoff/Short Work Weeks
> . . . .
> Due to an imbalance in the production process, it will be necessary for employees in certain areas to work a four day week, Tuesday–Friday, for the next two or three weeks. This action affects approximately 115 employees which work in the gusset, leg and first side areas on all lines. These employees will not work next Monday, March 12, but will return to work Tuesday, March 13. This cycle will be repeated an expected one to two more weeks. The employees will be informed of this schedule this afternoon.

On May 10, 1990, 4 days before the opening of the hearing before me pursuant to the notice included in the March 6 complaint, Scruggs gave Leachman a letter which stated, inter alia:

> Re: Somerville Mills
> Subject: *Response to October 18, 1989, Request For Information About Subcontracting*
> . . . .
> There has been no subcontracting out of work which was assigned to be sewn at the Somerville Mills plant. There have been a few cases where production was initially, and tentatively, assigned to be sewn at the Somerville plant, but this initial sewing assignment was changed before the production process began.

A letter from Scruggs, dated May 14, 1990 (the first day of the hearing), and hand delivered to Leachman on May 15, at the latest, states:

> RE: Somerville Mills
> SUBJECT: Layoff
> . . . .
> This letter confirms a telephone notification to your office of Friday afternoon [May 11, 1990], wherein I ad-

[20] My finding that the employees made this report to Leachman and that she relayed this report to Respondent is based on her testimony, which on timely objection was not received to show the truth of either report. As discussed to some extent, supra, Respondent's records show that during negotiations, Respondent from time to time shipped cut pieces, to be assembled, to Respondent's Alamo plant, to the Guatemala independent contractor, and to Royal Sewing in New York City.

[21] Because the Union specifically referred to work being shipped to Respondent's Alamo plant, this response by Attorney Scruggs impliedly conceded that he understood the Union's requests for subcontracting information as including work sent from the Somerville plant to other plants owned by Respondent. Because it was Scruggs alone who signed all of Respondent's letters to the Union in response to its requests for subcontracting information, and because none of such written requests was directed to Plant Manager Perritt, I attach no materiality to Perritt's testimony that he believed the Union was asking for the names and addresses of only contractors (like Royal Sewing and the Guatemala firm) who performed work for Respondent. As previously noted, Scruggs advised the Union that it was he who Respondent's ''designated bargaining representative,'' and all communications were to be directed to him, with a copy to Perritt ''if you wish.''

vised that there would be a layoff at the plant. The details are as follows: There has been insufficient output from the gusset department to keep the jobs busy further down the production line. Friday afternoon, employees in the Legs, First Side, Waist, Second Side, Tack, Examine, Tag and Box jobs were sent home early for lack of work for those particular job functions to do. This is a chronic situation and short duration layoffs and short days will continue from time to time until gusset output attains a level which will keep the other departments busy. This letter is intended to be notification of all such layoffs which occur for the balance of the month of May.

At the outset of the hearing on May 14, 1990, Scruggs moved to amend his March 9 answer so as to state that Respondent ''refused, from October 18, 1989 until May 10, 1990, to furnish the information described'' in the Union's letter of October 18, 1989; but to deny that such conduct by Respondent continued after May 10. This motion was granted over the General Counsel's objection.

Perritt testified that the words ''imbalance in the production process'' in Scruggs' March 9 letter meant that more units had been processed in the early stages of production than could be processed, without overtime work, by employees who worked in the later stages of production. The layoffs referred to in the March 9 letter included the cutters and the gusset sewers, who respectively perform the first and the second production operations.

Respondent manufactures panties in at least four Tennessee plants, owned and operated by it, located respectively in Scotts Hill and Henderson (which, as to panties, perform the cutting operation only), Somerville, and Alamo. Of these Tennessee plants, only Somerville is unionized. In addition, as previously noted, Respondent has some panties manufactured by a company in Guatemala and another company, Royal Sewing, in New York, New York; the record fails to show whether either of them is unionized. All panties assembled at plants other than the Somerville plant are upon completion sent to the Somerville plant, which sends to a distribution warehouse all completed panties, regardless of where they were assembled.

All fabric and other components ordered to make panties are initially sent to the Somerville plant. As to any batch of panties to be manufactured, Respondent's corporate production department in New York, New York, decides, before the first step (cutting) in the production process, where the panties are to be cut and where the panties are to be assembled. Then, as to work not to be performed at Somerville, the Somerville plant ships the appropriate fabric and/or other components to the appropriate plant. The cutters in Respondent's Somerville plant spend about 2 or 3 percent of their time cutting panties which are assembled in Respondent's Alamo plant or in the Royal Sewing and Guatemala plants; Somerville has been cutting material for these three plants since at least 1985. About 2 or 3 percent of the panties which are assembled in Somerville are cut in Respondent's Alamo, Henderson, and Scotts Hill plants. Respondent never notified the Union that 2 or 3 percent of the panties manufactured at Somerville are cut at other locations. As previously noted, cutters were included in the layoffs described in Scruggs' letter to Leachman dated March 9, 1990.

When asked why panties were sent to plants other than Somerville for assembly, Perritt replied that Somerville cannot make all the panties that the sales department can sell. Perritt further testified that so far as he knew, once the corporate production department in New York had issued a cutting order which as to a particular panties batch specified which plant was to perform the cutting and which plant was to perform the assembly, this allocation had never been changed. Perritt went on to testify that once a batch of panties had been cut in Somerville pursuant to a corporate production-department decision to have Somerville cut and assemble them, none of the assembly had ever been performed somewhere else. He testified that Respondent follows this practice because, once Somerville started to assemble the panties, it would be blamed for any problems which became apparent after partly assembled panties had been shipped elsewhere for completion. He further testified that Somerville gets blamed for problems which become apparent after components cut at Somerville are shipped elsewhere for the entire assembly operation.

Prior to the hearing, the General Counsel served on Respondent a subpoena which asked for records for piece goods cut in Somerville which were shipped to other locations for sewing and other processing during the period January 1, 1989, through May 4, 1990. In response to this subpoena, Respondent produced 80 one-page documents. As to each particular batch of panties covered by each page, that page shows (1) the date on which Respondent's corporate office decided to have the panties assembled at a plant other than the Somerville plant;[22] (2) the date on which the Somerville plant shipped the cut goods out for assembly; (3) as to Royal Sewing and Alamo, the name of the plant to which the cut goods were shipped; and (4) as to each batch, the number of panties, their style and pattern numbers, their sizes and colors, and the trim, labelling, and boxing to be used. These documents show that the assembly work was done by a total of three plants (Alamo, Guatemala, and Royal), and set forth the address of the Alamo plant.

E. *Analysis and Conclusions*

1. Respondent's insistence on meeting in Jackson

Section 8(d) defines the duty to bargain collectively, in relevant part, as ''the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession.'' Because the situs of bargaining negotiations does not constitute ''wages, hours, [or] other terms and conditions of employment,'' the situs issue in not a mandatory subject of collective bargaining.[23]

[22] Perritt testified that such a decision is always made on the issuance date shown on such a document. He further testified that he himself does not know the reasons for any particular decision of this nature.

[23] See generally *Covington Furniture Mfg. Co*., 212 NLRB 214, 216–219 (1974), enfd. 514 F.2d 995 (6th Cir. 1975); *Bartlett-Collins Co*., 237 NLRB 770, 772–773 (1978), enfd. 639 F.2d 654 (10th Cir. 1981), cert. denied 452 U.S. 961 (1981); *Latrobe Steel Co. v. NLRB*, *Continued*

In view of the ordinarily inseparable relationship between the statutorily specified duty to meet on the one hand, and the parties' respective postures as to the situs of such meetings on the other, evidence regarding the latter issue may assume significance in determining whether a party to negotiations has complied with the duty to meet and has bargained in overall good faith. See, e.g., *Clinton Food 4 Less*, 288 NLRB 597, 602–603 (1988). In addition, where the parties' failure to meet has been due at least partly to a disagreement about where to meet and the employees in the unit work at a single, fixed location, the Board will ordinarily find that the statutory bargaining requirements have been violated by a respondent which has refused to meet at or near the plant and, as a remedy, will sometimes require the respondent to meet there.[24] See *Tower Books*, 273 NLRB 671, 672–673, 682 (1984), enfd. 772 F.2d 913 (9th Cir. 1985); *Semperit Pacific, Inc*., 237 NLRB 478, 486–488, 490 (1978); *P. Lorillard Co*., 16 NLRB 684, 695–702 (1939), enfd. as modified 117 F.2d 921 (6th Cir. 1941), reversed and remanded with instructions to enforce in full 314 U.S. 512 (1942).[25] Of course, no such finding can be made, and no such order can be issued, where the unit employees work at more than one location or have no fixed place of work.[26] Moreover, even in the absence of such considerations, the Board has said that there is no per se approach to deciding where bargaining should take place, and that insistence on meeting at a location some distance from the unit employees' place of employment would not constitute or evidence an unlawful refusal to bargain if there is a showing of an overriding reason compelling negotiations elsewhere. See *Tower Books*, supra, 273 NLRB at 672. Nevertheless, the Board's use of what may be fairly described as a rebuttable presumption, that parties who cannot agree on the situs of negotiations are to meet at or near the place where the unit employees work, serves the purpose of preventing either party from foreclosing negotiations by proposing bargaining locations unacceptable to the other. Cf. *Bartlett-Collins*, supra, 237 NLRB at 773. In view of the purpose served by this presumption, it cannot be overcome merely by a showing that proposals for other meeting sites, although not agreed to, were advanced in subjective good faith, and were reasonable in the sense that they took into account the legitimate interests of both parties.

In this latter sense, it cannot be said that Respondent's proposal for meetings in Jackson was unreasonable. This proposal accommodated Respondent's legitimate interest in diminishing the distances which Company Vice President Young, a participant in all the negotiations, had to travel in order to attend. So far as the travel distances to the situs of negotiations were concerned, the proposed change from East Memphis to Jackson inconvenienced Respondent's attorney no less than the Union's officers, and inconvenienced Plant Manager Perritt no less than the employees on the Union's bargaining committee.[27] Moreover, the travelling distances which would have been imposed by a Jackson negotiation site, from the union negotiators' respective places of employment, are not so long as in themselves to suggest unreasonableness.[28] On the other hand, as to the negotiating site, neither were the Union's proposals shown to be unreasonable or advanced in bad faith. The Union initially proposed Somerville, which was the most convenient location for the employees and Plant Manager Perritt and was as convenient to Company Attorney Scruggs as to Union Officials Rudd and Leachman. The Union acceded to Respondent's proposal for meetings in East Memphis (which required more travelling by Vice President Young than would have been required by the Somerville location sought by the Union), but balked at Jackson, which called for more travel to negotiations by everyone but Young, and again proposed Somerville as a negotiating site. In view of the reason advanced by Respondent for initiating negotiations in East Memphis rather than Somerville—namely, a desire for a ''neutral'' site—Respondent is in a rather poor position to deprecate the Union's expressed basis for objecting to Respondent's proposed transfer of alternate negotiating meetings from East Memphis to Jackson—namely, that even the Memphis site had been Respondent's idea and initially objected to by the Union, that Respondent must have known when proposing Memphis how far Young would have to travel,[29] and that the ''psychological effect [on employees] that would result from such management dictation would [undermine] and weaken the union's effectiveness.'' While it is true that at the hearing Leachman grossly overstated the distance between Somerville and Jackson, the Union advised Respondent that the Union's rejection of a Jackson negotiating site was not based to a significant extent on the consequent increase in mileage and, moreover, Scruggs' correspondence to the Union underestimated the increase which Respondent's proposed change entailed in travelling distance for the Union's bargaining representatives (as well as himself). In view of this failure to

630 F.2d 171, 175–178 (3d Cir. 1980), cert. denied 454 U.S. 821 (1981); *Hutchinson Fruit Co*., 277 NLRB 497 (1985).

[24] Because the location of negotiations is not a mandatory bargaining subject, the Board's power to issue such an order is unaffected by the 8(d) strictures against compelling agreement or concessions. Cf. *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

[25] Cf. *Wavetronics Industries*, 147 NLRB 238, 243–245 (1964); *Gulf Concrete Co*., 165 NLRB 627, 632, 637 (1967); *N.C. Coastal Motor Lines*, 219 NLRB 1009, 1015 (1975) (but employer had unlawfully eliminated the bargaining unit prior to the hearing); *Port Everglades Towing Co*., 134 NLRB 795, 807, 810 (1961), modified on other grounds 315 F.2d 376 (5th Cir. 1963).

[26] See *B. F. Diamond Construction Co*., 163 NLRB 161, 175 fn. 93 (1967), enfd. 410 F.2d 462 (5th Cir. 1969); *Mid-America Transportation Co*., 141 NLRB 326 (1963), enfd. 325 F.2d 87 (7th Cir. 1963) (unit consisted of shipboard personnel).

[27] As to the 10 meetings whose hours are shown by the record, only one broke up as early as 5 p.m., and all the others broke up after 8 p.m. Accordingly, so far as the participants' convenience is concerned, the distance between the negotiating site and their respective homes would appear about as important as how far they had to travel to get there from their respective places of employment. However, the record shows the home addresses of only Plant Manager Perritt (Somerville) and employee Wilkerson (Mason, Tennessee), both of whom live closer to East Memphis than to Jackson. Scruggs' correspondence with the Union at least implies that Young lives in or near Scotts Hill, Tennessee, which is closer to Jackson than to East Memphis.

[28] Jackson is about 60 miles from downtown Memphis, where Union Officials Rudd and Leachman (as well as Company Attorney Scruggs) have their offices; and 47 miles from the plant, where the employee bargaining committee (as well as Plant Manager Perritt) work. Cf. supra, fn. 27.

[29] As previously, noted, East Memphis was geographically less convenient for Young than Somerville, where the Union wanted to meet.

reach an agreement as to the situs of negotiations, I apply the presumption that Respondent's duty to meet at reasonable places constituted under all the circumstances the duty to meet in Somerville. Further, I find nothing in the record to rebut this presumption; indeed, the Union repeatedly advanced this proposal, and on November 2, 1989, Respondent proposed a meeting at a Somerville location after Respondent's proposed meeting in Jackson.

Accordingly, I find that Respondent violated Section 8(a)(5) and (1) of the Act by insisting on meeting in Jackson. As to the date of this unlawful insistence, I find that it began no later than November 2, 1989 (the date of Scruggs' written proposal that the next meeting be held in Jackson notwithstanding the Union's strenuous October 19 and 26 objections to Respondent's October 12 proposal for alternate meetings at this site), and ended no earlier than November 6, 1989, the date of Scruggs' letter to the Union stating that the next negotiating session with Respondent could be held in Memphis on November 14 or 16.[30] Although this insistence at least arguably may have lasted for as little as 4 days, I do not regard it as de minimis in the circumstances of this case. Thus, such action likely played a part in the parties' failure to meet at all between October 4 and December 20. Respondent's November 2 letter proposing that the next meeting be held in Jackson was received by the Union on the very day which it had proposed a week earlier as a date for the next bargaining session, in Somerville; and Respondent did not send this November 2 letter until 14 days after the Union's strenuous October 19 protest of Jackson, even though Respondent had had reason to anticipate that its October 12 proposal of Jackson as the site for the next and all alternate subsequent meetings would be disliked by the Union, which had initially wanted meetings in either its downtown Memphis offices or in Somerville, and all nine of whose representatives would be inconvenienced by the proposed change to Jackson.

2. Respondent's alleged unilateral conduct

a. *As to receiving early paychecks*

An employer violates Section 8(a)(5) and (1) of the Act by effecting changes with respect to mandatory subjects of collective bargaining without giving the employees' collective-bargaining representative prior notice and an opportunity to bargain regarding the change.[31] The undisputed evidence shows that Respondent gave the Union no such notice or opportunity before abolishing, about late October 1989, Respondent's prior practice of permitting employees, upon receiving advance permission from supervision, to obtain their paychecks earlier on paydays than the employees would ordinarily have received them. The record further shows that for an undisclosed period thereafter, and perhaps for several months, no employee could obtain his paycheck on payday until the ordinary distribution period of the last half-hour of the workweek. Contrary to Respondent, I find that the hour at which employees can obtain their paychecks constitutes a mandatory subject of collective bargaining.[32] Accordingly, I find that by unilaterally effecting this change, Respondent violated Section 8(a)(5) and (1) of the Act. As to the impact of the change on employees, I note Plant Manager Perritt's testimony, in effect, that on the payday before Respondent stopped entertaining requests for early paychecks, so many employees had been able to obtain early paychecks that of Respondent's 200 production employees, only 45 were still working that afternoon.

b. *As to the production rate for sewing cotton gussets*

In addition, the undisputed record evidence shows that in January 1990, without giving the Union notice and an opportunity to bargain, Respondent changed the production rate for gussets on cotton panties. I agree with the General Counsel that such a rate constituted a mandatory subject of collective bargaining and that, therefore, Respondent's unilateral change in that rate violated Section 8(a)(5) and (1) of the Act.[33] The difference effected in the panties by use of the new method in sewing cotton gussets did not justify Respondent in unilaterally changing the production rate therefor.[34] Nor would Respondent's unilateral action be justified by a showing (contrary to the evidence summarized supra, part II,C,2) that in establishing production rates under the new method, management did not change the time assigned to any particular job element, used only the same master data sheet used in connection with the old method, or used the same data base (of job elements and times) which was used before the Union's certification. *Crystal Springs Shirt*, supra, 245 NLRB at 885. I note that Respondent ignored or rebuffed the Union's repeated inquiries at the bargaining table about the reason for the change.

Respondent's unilateral action cannot be justified on the ground that such action affected only a small proportion and number of unit employees. Even the particular change attacked in the complaint affected between 10 percent and 28 percent of the 200 production employees, depending on whether the cotton gusset work was performed by only 20 of the gusset operators or by all 55 of them.[35] I note, moreover, that the same method which Respondent instituted in sewing cotton gussets can be used in sewing almost all of the gussets sewn in the plant. Accordingly, if the proportion and number of employees affected by the method change in the instant case were to excuse the unilateral action attacked

[30] The amended consolidated complaint alleges that Respondent engaged in this conduct ''Since on or about October 12, 1989, until on or about November 6, 1989.''

[31] *NLRB v. Katz*, 369 U.S. 736, 742–743 (1962); *NLRB v. Eltec Corp.*, 870 F.2d 1112, 1117 (6th Cir. 1989); *Storer Communications*, 294 NLRB 1056 (1989).

[32] See *American Ambulance*, 255 NLRB 417, 418–419, 421 (1981), enfd. 692 F.2d 762 (9th Cir. 1982); *Accurate Die Casting Co.*, 292 NLRB 982 (1989) (date when vacation pay could be drawn); *King Radio Corp.*, 166 NLRB 649, 654 (1967), enfd. 398 F.2d 14 (10th Cir. 1968).

[33] *Waycross Sportswear v. NLRB*, 403 F.2d 832, 835–836 (5th Cir. 1968); *Advertiser's Mfg. Co.*, 280 NLRB 1185, 1197–1198 (1986), enfd. 823 F.2d 1086 (7th Cir. 1987); *Unoco Apparel*, 215 NLRB 89, 90–91 (1974); see also cases cited infra, fns. 34–35.

[34] *Crystal Springs Shirt Corp.*, 245 NLRB 882, 885 (1979), enfd. 637 F.2d 399 (5th Cir. 1981); *Master Slack*, 230 NLRB 1054, 1055 (1977), enfd. 618 F.2d 6 (6th Cir. 1980).

[35] See *NLRB v. M. A. Harrison Mfg. Co.*, 682 F.2d 580, 581–582 (6th Cir. 1982); *Advertiser's Mfg. Co.*, supra, 280 NLRB at 1197–1198; *Van Dorn Plastic Machinery Co.*, 265 NLRB 864, 865, 869 (1982), enfd. in part and remanded in part 736 F.2d 343 (6th Cir. 1984), decision adhered to on remand, 286 NLRB 1233 (1978), enfd. 881 F.2d 302 (6th Cir. 1989).

in the instant complaint, Respondent would be free unilaterally to effect by degrees a change in the pay of more than a quarter of the production employees in the bargaining unit.

3. Respondent's alleged failure and refusal to provide information necessary for, and relevant to, the Union's bargaining function

a. *General principles*

As the Court of Appeals for the Sixth Circuit said in *NLRB v. Postal Service*, 841 F.2d 141, 144 (1988) (footnotes omitted):

> Generally, an employer's duty to bargain collectively established in 8(a)(5) of the National Labor Relations Act, obligates it to provide a labor union with relevant information necessary for the proper performance of the union's duties as the employees' bargaining representative. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303, 99 S.Ct. 1123, 1125, 59 L.Ed.2d 333 (1979); *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 87 S.Ct. 565, 17 L.Ed.2d 495 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 76 S.Ct. 753, 100 L.Ed. 1027 (1956). The failure to provide such information constitutes an unfair labor practice in violation of 8(a)(1) and (5) of the Act, 29 U.S.C. § 158(a)(1), (5).

As to the standards to be used in determining whether this employer duty encompasses particular information requested by the bargaining representative, that court said in *E. I. du Pont & Co. v. NLRB*, 744 F.2d 536, 538 (1984):

> When a union seeks information concerning the bargaining unit itself, that information is presumptively relevant and will be ordered disclosed without any showing of relevance by the union unless the employer itself rebuts the presumption. When a union seeks nonunit information, however, the burden is upon the union, and in this case upon the General Counsel, to establish relevance without the benefit of any presumption. *NLRB v. Rockwell-Standard Corp.*, 410 F.2d 953, 957 (6th Cir. 1969); see also *NLRB v. Leland Stanford Junior Univ.*, 715 F.2d 473, 474 (9th Cir. 1983); *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61, 69 (3d Cir. 1965) . . . . The Board need only find a ''probability that the desired information [is] relevant . . . and that it would be of use to the union in carrying out its statutory duties and responsibilities.'' *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 437, 87 S.Ct. 565, 568, 17 L.Ed.2d 495 (1967); see also *Rockwell Standard*, 410 F.2d at 957; *General Elec. Co. v. NLRB*, 466 F.2d 1177, 1182 (6th Cir. 1972). Each case involving this issue ''must turn upon its particular facts. The inquiry must always be whether or not under the circumstances . . . the statutory obligation to bargain in good faith has been met.'' *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153–54, 76 S.Ct. 735, 756, 100 L.Ed. 1027 (1956) (footnote omitted).

See also *Barnard Engineering Co.*, 282 NLRB 617, 619 (1987).

b. *Copies of Respondent's bargaining agreements at other plants*

In the instant case, the first six bargaining sessions between Respondent and the Union, over a period of more than 7 months, had failed to produce agreement with respect to a number of substantial issues which are typically dealt with in collective-bargaining agreements. As to some of these unresolved issues. (e.g., grievance and arbitration, strikes and lockouts, discrimination, deductions for dues and credit union, and duration), any acceptance by Respondent of contract clauses covering similar issues in other plants would not self-evidently have been affected by the kind of garments made in such plants and, therefore, might suggest a possible willingness by Respondent to agree to similar clauses as to Somerville. Moreover, although as to other unresolved issues at Somerville the substance of what Respondent was willing to agree to at other plants was likely affected by the products made there,[36] such agreed-upon provisions might nevertheless have provided a basis for union proposals acceptable to Respondent at Somerville; for the employees at all four of Respondent's organized plants have similar skills and classifications, some panty-production operations usually performed at Somerville are on occasion performed (sometimes on panties to be completed at Somerville) by Respondent's plants in Henderson and Scotts Hill (Tennessee), and these two unionized Tennessee plants are about 60 miles from Somerville.[37] Further, in February 1990 the Union told Respondent in terms that as to all unresolved issues, the Union would be willing to give serious consideration to provisions as to that issue in a bargaining agreement between Respondent and another union at another plant; the Union first asked about Respondent's contract provisions elsewhere (as to drug testing and searches and paid funeral leave) in a context which must have suggested to Respondent that the Union believed such provisions might form a basis for agreement at Somerville; the Union advised Respondent in October 1989 that the requested contracts would reveal whether Respondent's bargaining demands were a matter of corporate policy, and ''could provide the kinds of information that maybe very helpful in helping both parties in our efforts to resolve our differences in good faith, and sign a contract that both parties can live with;'' and, in subsequently requesting ''all contracts between the Furniture Workers Division, I.U.E. union'' (the Union is a local of that division)—without any limitation as to products manufactured, employee skills, or any other characteristic, Respondent asserted that such documents would enable it to ''intelligently and properly evaluate'' the Union's contract proposals, would indicate whether the Union's contract proposals were a matter of uniform union policy, and ''would also provide the kind of information that may be helpful in helping both parties in our efforts to resolve our differences in good faith.''[38]

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[36] E.g., wages, hours, overtime, payment for nonworking time, insurance, leaves of absence, temporary job assignments, ''special employees,'' seniority, layoff or recall, plant safety or security, management rights, and union visitation rights.

[37] Respondent's unionized plant in Thurmont, Maryland, is about 850 miles from Somerville.

[38] Respondent contends that this letter cannot properly be accorded any weight as to the relevancy issue, in view of the final sentence in this letter—''This request is submitted without prejudice to the

I conclude that the Union's request for Respondent's contracts at other unionized locations (three contracts at most) was made in good faith, that Respondent knew at all material times why the Union was asking for this information, and that the General Counsel has sustained his burden of showing that such information was relevant and would be of use to the Union in carrying out its statutory duties and responsibilities. See *E. I. du Pont*, supra, 744 F.2d 536, where the employer made its wage proposals on the basis of prevailing wages in the area of the central Tennessee plant whose production and maintenance employees were represented by the union, but the union wished to pursue negotiations on the basis of the textile-fibers division in which the employer had included that plant. The Sixth Circuit held that the union was entitled to wage data for production and maintenance employees in the employer's textile-fibers division plants in Virginia and the Carolinas. See also *E. I. du Pont & Co*., 271 NLRB 1153, 1156–1157 (1984). Respondent's efforts to distinguish this latter case, on the ground that the required wage information was for employees producing the same product, disregard the fact that the products cut at Respondent's Scotts Hill and Henderson plants include the same product that is cut and assembled at Somerville. In any event, although all the employees involved in this aspect of the 1984 *DuPont* case removed, inspected, and packed bobbins of yarn, the decision does not suggest that all the plants in question produced the same kind of yarn. I note, moreover, that although the bargaining in that case related to a ''phase 30 windup'' system, the Board's Order (271 NLRB 1153) required the employer to provide ''information of other plants that have the phase 30 windup (doff-paks) *or something similar relating to doff-paks*'' (emphasis added).

Respondent's posthearing brief does not rely on Scruggs' at least implied assertions, in his October 12, 1989 response to the Union's initial request for the contracts, that the Union's request was overly broad in that it requested all of each contract and not merely portions thereof. See *A-Plus Roofing*, 295 NLRB 967, 972 fn. 7 (1989). In any event, Respondent never did provide even contract clauses covering the three subjects (drug testing and searches and paid funeral leave) which the Union specifically asked about during the October 4, 1989 negotiations; or the contract clauses whose subjects were specifically described in the Union's letter to Respondent dated February 20, 1990.

For the foregoing reasons, I find that Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to comply with the Union's request for copies of collective-bargaining agreements covering Respondent's organized plants.

c. *Information regarding subcontracting*

The undisputed evidence shows that employees on the bargaining committee told the Union that unit employees were being sent home early, and being laid off for lack of work, while at the same time work was being shipped out the plant. Because such reports proceeded from individuals (including a shipping department employee) in at least a fairly good position to know the facts, I find that such reports were sufficient to entitle the Union to obtain information from Respondent relevant to a possible relationship between the employees' failure to work full time and possible subcontracting by Respondent.[39] On October 18, 1989, on the basis of these reports, the Union told Respondent that the Union had received reports that unit employees were ''constantly experiencing a shortage of work due to the company contracting out the work to non-union factories.'' Then, the Union asked Respondent to provide, in substance, the names and addresses of the subcontractors; what was being contracted out; who had decided to contract it out; why the decision had been made; when the contracting out began; how much work unit employees had lost because of the contracting out; and the savings by reason of, and the labor costs of, the contracting out. I find that the General Counsel has sustained his burden of showing that the information so requested was relevant to the subject matter of the complained of layoffs.[40] If supplied, such information would have helped the Union to find out whether the unit employees could have performed the work if it had not been contracted out; whether reversal of a contracting out decision would have to take into account the rights and needs of other firms; what company arguments the Union would likely have to meet in order to persuade Respondent to have work performed by unit employees rather than contracting it out; what union arguments (including interplant shipping costs and shipping times, whose amount would be suggested by the subcontractors' addresses) would likely be most persuasive in support of this position; and the factual underpinning for Respondent's rather likely contention that at least on occasion, work was contracted out to save money.

Respondent's duty to provide this information was not relieved by Attorney Scruggs' assertion to the Union that there was no shortage of work or that, at least, there was no shortage due to subcontracting. As to the assertion that there was no shortage of work, Respondent seems to base this claim on the view that all the employees would at all times have been working but for absenteeism among employees who performed work early in the production process, and but for computer generated mistakes by Respondent in scheduling production. However, so far as the record shows, Respondent never gave the Union this rather artificial explication of Scruggs' representations, quite possibly because Respondent expected that the Union would seek to limit subcontracting, in order to avoid layoffs at Somerset, even if such layoffs would not have been threatened but for absenteeism in other classifications, or management error. As to Scruggs' further representation to the Union that any shortage of work at Somerville was not due to subcontracting, Respondent's brief

company's objection to the relevancy of your October 10, 1989, request to the Company for this same information.'' However, Respondent does not appear to be inviting an accusation of harassing tactics by averring that this letter from Respondent to the Union constituted a demand for information which Respondent knew to be irrelevant to negotiations.

[39] *Corson & Gruman Co*., 278 NLRB 329 fn. 3, 334 (1986), enfd. 811 F.2d 1504 (4th Cir. 1987); *National Cleaning Co*., 265 NLRB 1352 (1982), enfd. 723 F.2d 746 (9th Cir. 1984). The record before me shows that employees were in fact being laid off in early 1990, and that Respondent was in fact shipping out of the Somerville plant, for assembly by employees of other contractors, components which were the same as the components often assembled by employees in the Somerville unit.

[40] *New York Post Corp*., 283 NLRB 430, 439–440 (1987); *Clinchfield Coal Co*., 275 NLRB 1384, 1395–1396 (1985); *Quarto Mining Co*., 282 NLRB 696, 699–700 (1987).

relies on the testimony that the Somerville plant has been cutting panty components, to be assembled by Alamo, Royal, or the Guatemala contractor, since at least 1985. However, there is no evidence that Respondent ever gave the Union this rather attenuated explanation of Scruggs' claim, quite possibly because Respondent expected that knowledge of this prior practice would not deter the Union from asking Respondent to refrain from laying Somerset employees off while sending to Royal Sewing, to Guatemala, and to the Alamo plant work of the same kind that the Somerville unit employees regularly performed. In any event, the Union was not required to be satisfied with Scruggs' assurances; see *Walter N. Yoder & Sons v. NLRB*, 754 F.2d 531, 535 (4th Cir. 1985).

I regard as irrelevant, to the Union's right to obtain the requested information, the evidence that the practice of sending to Royal Sewing and Guatemala for sewing some components cut at Somerville predated the Union's certification; that after a cutting order had been filled out, Respondent had never decided (even before the cutting had been performed) that the components should be assembled at a plant other than the one named in the cutting order; and that although panties were sometimes cut in one plant and assembled in another, Respondent had always had all steps in the assembly process performed in one plant. There is no evidence that Respondent ever gave any of this information to the Union; but even if the Union knew about such prior practices, the Union could have used the requested information as the basis for a proposal that in order to avoid layoffs in the bargaining unit, Respondent could on occasion either alter the decision (reflected in the cutting order) to have assembly work performed by Royal Sewing or by the Guatemala plant; plan to have some steps in the assembly process performed in Somerville and later or earlier steps performed by Royal Sewing or by the Guatemala plant;[41] or have Somerville perform cutting work which Respondent had initially planned to have performed in other plants, perhaps for assembly by Somerville. I note that on the occasions (testified to by Perritt) when insufficient production by gusset sewers caused layoffs among the employees assigned to later steps in the production process, such laid-off employees could perhaps have been assigned to working on panties (which Respondent shipped to Guatemala for assembly) of a style which did not call for gussets.

Respondent errs in contending that the Union's October 8 and December 13, 1989 requests for information were satisfied when on May 10, 1990, Scruggs advised the Union that there had been no subcontracting out of work which was assigned to be sewn at the Somerville Mills plant. This reply was complete and accurate only on the assumption that the Union knew about Respondent's practice of deciding before the cutting process the location where assembly was to be done, and had merely been asking about instances where Respondent had changed its mind after the cutting had begun. For the reasons indicated previously, Respondent had no basis for either assumption. That Respondent on May 10, 1990, was knowingly providing a dissembling response is indicated by Scruggs' January 15, 1990 letter, which asserted, for the first and only time, that the Union's ''request is burdensome and expensive to compile, and would contain confidential information, the disclosure of which could adversely affect the company's competitive position''; Scruggs would hardly have attached this description to the information in his 51-word May 10 letter. In any event, Respondent's delay of more than 6 months between the October 18, 1989 letter and Respondent's May 10, 1990 purported reply was unreasonably long and, therefore, would have violated Section 8(a)(5) even if the May 10 letter had in fact contained the requested information. *Inner City Broadcasting Corp*., 270 NLRB 1230, 1232 (1984).

Although Respondent's letter of January 15, 1990, refused to supply the requested information on the ground (inter alia) that compiling it would be burdensome and costly, such contentions do not warrant dismissal of the 8(a)(5) allegations, because Respondent neither discharged its burden of establishing the truth of such contentions, nor offered to bargain with the Union about who should bear such alleged costs. *Tower Books*, supra, 273 NLRB 671. Indeed, Respondent never so contended to the Union on any other occasion, and has not so contended in its posthearing brief. The General Counsel contends that substantially the same considerations call for rejection of Respondent's contention in that same letter—and also never raised before or since—that some of the requested information constituted confidential material whose disclosure would adversely affect Respondent's competitive position. Even if confidentiality considerations justified Respondent in failing to provided some of the requested information, such considerations would not have justified Respondent's refusal to give the Union the rest of it. *A-Plus Roofing*, supra, 295 NLRB 967, 972 fn. 7. Moreover, because Respondent has never specified what information Respondent regards as confidential, Respondent has, a fortiori, failed to meet its burden of showing that its alleged confidentiality interest outweighs the Union's need for the requested information.[42] Further, Respondent's posthearing brief, far from making a confidentiality claim, alleges that the requested material was supplied on May 10, 1990; Respondent's January 15, 1990 letter was the only occasion in which a confidentiality claim was even made; and Respondent has never complied with its duty to come forward with some offer to accommodate its alleged confidentiality concerns with its bargaining obligations. In view of the foregoing circumstances, the confidentiality claim is rejected. *Maben Energy Corp*., 295 NLRB 149 fn. 1 (1989); cf. *General Dynamics Corp*., 268 NLRB 1432 (1984).

For the foregoing reasons, I find that Respondent has violated Section 8(a)(5) and (1) of the Act by failing and refusing to supply the Union with the information set forth in the Union's letter to Respondent dated October 18, 1989.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

[41] Such changes would not likely affect Respondent's shipping costs because all components are shipped from and all completed products are shipped to, the Somerville plant.

[42] *Washington Gas Light Co*., 273 NLRB 116 (1984); *Mary Thompson Hospital*, 296 NLRB 1245 (1989); see also *NLRB v. Pfizer, Inc*., 763 F.2d 887, 890–891 (7th Cir. 1985).

3. At all times since December 5, 1988, the Union by virtue of Section 9(a) of the Act has been the exclusive representative, for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, of Respondent's employees in the following unit, which is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production, maintenance, and shipping employees at the Somerville, Tennessee facility including quality control, inspectors, expeditors, piece good records clerk, and shipping clerks; excluding office clericals, guards and supervisors as defined in the Act.

4. Respondent has violated Section 8(a)(5) and (1) of the Act in the following respects:

(a) By insisting between November 2 and 6, 1989, that continuing contract negotiations be moved to an unreasonable location.

(b) By imposing stricter standards for early disbursement of paychecks, and by changing the production rate for employees who sew gussets in cotton panties, without giving the Union prior notice and an opportunity to bargain.

(c) By failing and refusing to honor (1) the Union's request for Respondent's bargaining agreements at other locations, and (2) the Union's request for information dated October 18, 1989.

5. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has violated the Act in certain respects, I shall recommend that Respondent be required to cease and desist from such conduct, and like or related conduct, and to take certain affirmative action to effectuate the policies of the Act.

Affirmatively, Respondent will be required, on request by the Union, to return to the production rate, for employees who sew gussets on cotton panties, used before January 1990. Further, and in accordance with more recent Board decisions finding an unlawful insistence on unreasonable negotiating sites (*Tower Books*, supra, 273 NLRB at 682; *Semperit Pacific*, supra, 237 NLRB at 490), Respondent will be required, on request by the Union, to meet in or near the plant in Somerville, Tennessee. In addition, Respondent will be required to honor the Union's request for Respondent's bargaining agreements at other locations, and the Union's information request dated October 18, 1989. Also, Respondent will be required to make employees whole for any losses they may have suffered by reason of the unilateral change in the production rate for gussets, with interest as called for in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Because, with respect to early paychecks, Respondent has returned to the practice observed before the unilateral change in about November 1989, as to this violation no affirmative relief is called for. In addition, Respondent will be required to post appropriate notices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[43]

ORDER

The Respondent, I. Appel Corporation d/b/a Somerville Mills, Somerville, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Insisting that continuing contract negotiations with respect to the following bargaining unit be moved to an unreasonable location:

> All production, maintenance, and shipping employees at Respondent's Somerville, Tennessee facility including quality control, inspectors, expeditors, piece goods records clerk, and shipping clerks; excluding office clericals, guards and supervisors as defined in the National Labor Relations Act, as amended.

(b) As to employees in the foregoing bargaining unit, imposing stricter standards for early disbursement of paychecks, changing the production rate for employees who sew gussets in cotton panties, or otherwise changing rates of pay, wages, hours of employment, or any other terms and conditions of employment, without giving prior notice and an opportunity to bargain to Furniture Workers Division, Local Union 282 of the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO.

(c) Failing or refusing to honor Local 282's request for Respondent's bargaining agreements at other locations, Local 282's request for information dated October 18, 1989, or any other request by Local 282 for relevant information necessary for the proper performance of Local 282's duties as the bargaining representative of the foregoing unit.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request by Local 282, return to the production rate, for employees who sew gussets on cotton panties, used before January 1990.

(b) On request by Local 282, conduct negotiating sessions, with respect to the foregoing bargaining unit, in or near Respondent's facility in Somerville, Tennessee.

(c) Honor Local 282's request for Respondent's bargaining agreements at other locations, and Local 282's October 18, 1989 request for information.

(d) Make employees whole for any losses they may have suffered by reason of Respondent's unilateral change in production rates for sewing gussets in cotton panties, in the manner set forth in the remedy section of this decision.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

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[43] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(f) Post at its facilities in Somerville, Tennessee, copies of the attached notice marked ''Appendix.''[44] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[44] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''